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No. 72-580

In the

Supreme Court of the United States

OCTOBER TERM, 1972

AMERICAN CIVIL LIBERTIES UNION, et al.,
Petitioners,

vs.

MELVIN R. LAIRD, Secretary of Defense, et al.,
Respondents.

PETITIONERS' REPLY TO RESPONDENTS' MEMORANDUM IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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Respondents' memorandum in opposition to the petition for a writ of certiorari is in two parts.

The first part (pages 2-3), in arguing that the complaint failed to state a claim, virtually ignores the specific distinctions between this case and *Tatum* v. *Laird* that were set out at page 6 of the petition. Accordingly, we will not comment further upon it.

The second part (pages 4-6) asserts that "furthermore", the equitable relief sought by petitioners was properly denied for various factual reasons. This second

part is addressed to the denial of a preliminary injunction by the district court. It thus dwells on a matter irrelevant to the determination of whether the complaint states a cause of action that requires an answer to be filed. Moreover, this portion of the memorandum makes factual assertions that are unsupported and contradicted by the record.

Thus, it is asserted that, "Files were maintained on 'organizations or individuals who had high potential for creating or initiating civil disturbance' (Tr. 141) or whose assistance would be especially valuable in the event of such a disturbance to help 'put a damper on any violence' (Tr. 538)." (Br. 4.) In fact, the record shows that files were routinely maintained on organizations and individuals who were not shown to have such a potential. The Army's principal witness testified at the hearing on the preliminary injunction that if a "perfectly legitimate and peaceful organization like the American Friends Service Committee" co-sponsored a demonstration or other activity with another organization which had engaged in violence and "related activities", a file would be maintained on the American Friends Service Committee. (Tr. 847-48.) This same witness also testified that if an organization made a public statement in defense of a person who had engaged in violent activities or provided legal counsel, a file was established on such organization. (Tr. 758.)

It is also asserted that the files "fell far short of containing the dragnet of personal and private information which allegedly was being collected by the Army." (Br. 4.) In fact, the record shows the files contained precisely

such personal and private information, including facts relating to sexual and financial matters. (Tr. 446-47.)

Again, it is asserted that files consisted only of newspaper clippings. (Br. 4.) In fact, such "clippings" included additional information, some of which came from reports of military intelligence undercover operations. (See petition for writ of certiorari, p. 8.)

It is asserted that, "No so-called 'covert' surveillance of civilians was conducted. (Tr. 144, 156.)" (Br. 5.) In fact, the record shows that such surveillance was routinely conducted. The Army's principal witness stated that undercover agents were utilized who were assigned to other branches of the military service (Tr. 648-49), that the agents used "cover" names (Tr. 694), and that the witness himself engaged in undercover operations, perhaps once per week. (Tr. 171.)

Other assertions in the memorandum are similarly either inaccurate or incomplete statements of what the evidence shows. (*E.g.*, compare the assertion concerning the reason for maintaining a file on petitioner Jesse Jackson, Br. 4, with the statement of the Government's own witness, Tr. 742-43.)

In short, in attempting to minimize the importance of the pending petition for certiorari, the Government's memorandum seriously misreads the record before this Court.

Finally, the assertion by the Government that the activities complained of are no longer carried on is contradicted by evidence in the record (cf., Tr. 536, 540), and is

a question which should properly be for the consideration of the district court on remand after trial.

Respectfully submitted,

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